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# Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 211

A. L. BROWN,
*Petitioner*

*vs.*

GENERAL MOTORS CORPORATION,
*Respondent*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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## REPLY OF PETITIONER TO BRIEF OF RESPONDENT

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## CASES CITED


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# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1393

A. L. BROWN,
*Petitioner*

*vs.*

GENERAL MOTORS CORPORATION,
*Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## REPLY OF PETITIONER TO BRIEF OF RESPONDENT

### REVIEW ON WRIT OF CERTIORARI SHOULD BE GRANTED

There are adequate and important reasons for granting review by writ of certiorari in the present instance. This is a products-liability case involving the responsibility of a

manufacturer of a bulldozer for its defective and negligent design. It is representative of an increasing volume of litigation in our complex economy to fix and determine the responsibility of manufacturers of motor vehicles and machinery to remote users. These cases are very largely in the federal courts because of the diverse citizenship of the parties involved, since large manufacturers of such machinery constantly distribute beyond the state of origin.

In the present case the questions are: (1) whether the Court of Appeals shall be permitted to override the clearly established and applicable law of Ohio governing breach of warranty, and (2) whether the Court of Appeals shall be permitted to determine disputed issues of fact and thus deny to the petitioners a jury trial on the issue of negligence, which is concededly governed by the laws of South Carolina.

The Court of Appeals has decided these important questions of State law in conflict with the decisions of these States and has denied to the petitioner his right to a jury trial under the Seventh Amendment to the Constitution of the United States.

## ON THE WARRANTY ISSUE THE LAW OF OHIO IS IGNORED IN RESPONDENT'S BRIEF

This record, and indeed the respondent's brief, leaves it undisputed that this bulldozer did in fact start in gear. Such starting was contrary to the claim made by General Motors that it would not start in gear and was contrary to long standing custom in the design of these machines. If there was a warranty under Ohio law, as we say there was, this warranty was clearly breached, for General Motors own witness admitted that the machine did not meet the claim made for it. (Record Vol. I, pp. 230-31)

Respondent argues the case by ignoring the established law of Ohio covering the responsibility of a manufacturer of a defective product—either in warranty or strict liability. The Ohio case of *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 NE 2d 92 (1965), which was the controlling case relied upon by the plaintiff in the trial court and the Court of Appeals, is not even cited by the respondent. After Petition for Certiorari was filed (but before the General Motors brief in opposition) the Supreme Court of Ohio affirmed the *Lonzrick* case, 6 Ohio St. 2d 227, 218 NE 2d 185 (1966) and fully supported the reasoning of the intermediate appellate decision. Again this is not cited by the respondent, who instead continues to rely upon the Ohio Sales Act, as did the majority decision in the Court of Appeals for the Fourth Circuit. (See G.M. Brief pp. 1, 21, 22, 26) The *Lonzrick* case (both on the intermediate appeal and in the Ohio Supreme Court) established that under Ohio law of products liability the Sales Act has no bearing, nor need the plaintiff show a relationship of privity or prove reliance upon representations of the seller. This is a case of warranty sounding in tort, based upon and flowing from the implied representation of the manufacturer who produced the product and placed it in the channels of commerce.

We quote from the decision of the Ohio Supreme Court, affirming the intermediate appellate court in *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 NE 2d 185:

> "The precise questions this court is required to determine are: (1) Where a defendant manufactures and sells roof joists, is there implicit in the production and sale of this product the representation that the joists are of good and merchantable quality and safe for their ordinary intended use? and (2) when, in fact, such steel joists were defective and while being devoted to their ordinary intended

use collapsed because of such defect and fell to the floor and injured the plaintiff, who was working on the floor below these steel roof joists in a place where his presence was reasonably to be anticipated by the defendant manufacturer, is such innocent injured party restricted to prosecuting a tort action for damages on the basis of negligence alone, or may be proceed in tort on the theory of an implied warranty?" (218 NE 2d at 188-9)

* * *

"This 'kind of warranty' arose not out of a contract of sale but out of the duty of a manufacturer or seller of a product to protect the person consuming or using that product in the ordinary way in which it was intended to be used from the harm of injury to person or property caused by a defect in the product." (218 NE 2d at 190)

* * *

"It is, then, settled law in this state, *Toni*, supra, and *Inglis*, supra, that there can be an action in tort, based upon breach of warranty, and no contractual relation between the plaintiff and the defendant is required." (218 NE 2d at 192)

The Ohio Supreme Court also held specifically that there was no need for the plaintiff to show that he had relied upon a representation made by the defendant:

"The fact that the plaintiff saw the advertisement is a sound basis for recovery, *but the fact that he did not read an advertisement is not a sound basis for denying recovery*. Such a rule looks not to the defect in the product which produced the injury, but focuses upon the

question of whether the plaintiff saw an advertisement, which is not relevant to the creation of the risk of harm to the plaintiff.' (218 NE 2d at 192)

We respectfully urge that the Supreme Court refer to the *Lonzrick* decision both in the intermediate Appellate Court (decided before the present case was tried) and in the Ohio Supreme Court. There has been a clear failure by the Court of Appeals to apply the law of Ohio which concededly governs the present case, and under which the petitioner is entitled to the judgment rendered in the trial court.

## THERE WAS A FACTUAL ISSUE AS TO NEGLIGENCE ON WHICH PETITIONER IS ENTITLED TO A JURY TRIAL IF THE WARRANTY JUDGMENT IS NOT AFFIRMED

The General Motors brief is devoted largely to an exposition of facts which it believes support the defendant's position (16 out of 23 pages). This elaborate review of fact and contention makes it all the more clear that there was and is a real dispute about the facts and particularly the inferances to be drawn from them as to the negligence of General Motors in the design of the starter system on this bulldozer. See e.g., the concession on p. 7 of respondent's brief that there is a "conflict" in the testimony.

Repeatedly the Respondent goes back to its argument that if the machine would not start in gear there would have been no purpose in having a shield. (Resp. Br. 13, 14-15) This merely begs the question. Since the bulldozer admittedly would start in gear and was therefore dangerous without a shield, the real question is: *Why then should there not have been an EFFECTIVE shield to prevent inadvertant*

*starting in gear?* A shield which was not effective surely became a trap, and a jury was entitled to say that this was a negligent design.

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We respectfully move the Court for the issuance of a Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

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